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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No.....

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

against

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Waterman Steamship Corporation, prays that a writ of certiorari issue to review an order and judgment of the United States Court of Claims entered October 5th, 1954 granting defendant's motion to dismiss the suit for want of jurisdiction.

OPINION BELOW.

The opinion of the United States Court of Claims, printed in Appendix B hereto, *infra*, p. 14, is reported at 124 F. Supp. 622.

Jurisdiction.

The order and judgment of the United States Court of Claims sought to be reviewed was entered October 5th, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. §1255 (1).

Question Presented.[1]

Whether the Court of Claims has jurisdiction of a suit to enforce the contractual obligations of the United States to pay its share of general average, as owner of cargo carried on a privately owned and operated ocean vessel, or whether the Court of Claims has been ousted of jurisdiction in such cases by the Suits in Admiralty Act (46 U. S. C. §741 *et seq.*).

Statutes Involved.

The statutory provisions involved are the Tucker Act (28 U. S. C. §1491), the Suits in Admiralty Act (46 U. S. C. §741 *et seq.*) and the Public Vessels Act (46 U. S. C. §781 *et seq.*).

Statement.

On January 22nd, 1954, Petitioner commenced suit against the United States under the Tucker Act, 46 U. S. C. §1491, in the Court of Claims. Its petition (R. 1-14) alleged in substance as follows:

The United States and numerous merchants shipped goods on the *SS Fairisle* for carriage from New York to Bremen. The vessel was owned by petitioner and oper-

[1] The same question and related questions are presented in Petitions for Writs of Certiorari to the Court of Claims being filed in *Lykes Bros. Steamship Co.* v. *United States*, 124 F. Supp. 622, *Waterman Steamship Corporation* v. *United States*, 124 F. Supp. 634 and *United States Lines Company* v. *United States*, 124 F. Supp. 375.

ated in its regular service between North Atlantic ports of the United States and ports of continental Europe.

The contracts of carriage with the United States were evidenced as to most of the Government goods by bills of lading and as to some by a Space Contract. Under both forms of contract the United States agreed to contribute with the shipowner, as did all other cargo interests, to general average sacrifices and expenditures made and incurred for the common benefit.

While en route to Bremen on or about January 25th, 1948, the vessel accidentally stranded in the Elbe River due to causes for which the petitioner was not liable. The stranding threatened the loss of the vessel and her cargo, including the goods owned by the United States and valued at $188,189.75.

For the common benefit and to save the vessel and cargo, the petitioner made and incurred sacrifices and expenditures of a general average nature (salvage fees, tugs, temporary repairs, etc.) totaling $133,816.71. As a result, the vessel was brought off the strand and both vessel and cargo were saved and the venture was successfully completed. The Government cargo was delivered by petitioner without exercising its lien for general average contributions. In accepting it the Government impliedly agreed to pay its proportion of the general average losses. In addition after the Office of the Chief of Transportation, War Department, was informed of the general average situation, it wrote to the General Average Adjusters under date of February 5th, 1948: "If your General Average invoice for the Army assessment is found in order when it is received, it will be approved and placed in proper channels for payment." Accordingly, the United States is contractually bound to pay its rightful share of general average, not only by the express terms of the contracts of

carriage but also by its express and implied undertakings after the event.

The proportionate contribution in general average due from the United States amounts to $32,912.00 and has not been paid.

The Government moved to dismiss the suit contending that, because the cause of action was maritime in nature, the Suits in Admiralty Act vested exclusive jurisdiction in the District Courts. R. 63.

Petitioner contended that the legislative history of the Suits in Admiralty Act, its language and the weight of authority were to the effect that suit could not be brought under the Suits in Admiralty Act unless it arose out of the ownership or operation of a vessel by or for the United States.

The Court below decided that exclusive jurisdiction was in the District Courts even though the vessel involved was privately owned and operated. In so holding it expressly disagreed with the District Court, Southern District of New York, in *American President Lines, Ltd.* v. *United States,* 75 F. Supp. 110; *States Marine Corp. of Del.* v. *United States,* 120 F. Supp. 585; and *Prudential Steamship Corp.* v. *United States,* 122 F. Supp. 164. In addition it attempted to distinguish *Ryan Stevedoring Co.* v. *United States,* 175 F. 2d 490 (2nd Cir. 1949), certiorari denied, 338 U. S. 899 and ignored *The Everett Fowler,* 151 F. 2nd 662 (2d Cir. 1945), certiorari denied, 327 U. S. 804; and *C. F. Harms Co.* v. *Erie R. Co. et al.,* 167 F. 2d 562 (2d Cir. 1948).

The Court also ignored *Alcoa Steamship Company* v. *United States,* 80 F. Supp. 158 (S. D. N. Y. 1948) (reversed on other grounds, 2d Cir. 175 F. 2d 661, aff'd 338 U. S. 421), a suit under a bill of lading for freight on Government cargo carried by a private vessel in which the District Court sustained Tucker Act jurisdiction. On appeal in this Court

the Tucker Act jurisdiction of the District Court was not attacked. However, the record disclosed that it was a vigorously contested issue below and this Court in deciding the merits implicitly affirmed the holding in the District Court on the point. *Chicago* v. *Willard,* 220 U. S. 413, 419.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

1. By its decisions in this and other recent cases,[2] the Court of Claims virtually has abdicated its jurisdiction in the whole field of maritime contracts apparently under the belief that the Suits in Admiralty Act and the Public Vessels Act together constitute an all-inclusive grant of jurisdiction in such matters to the District Courts.

Yet, in *Calmar Steamship Corp.* v. *United States,* 345 U. S. 446, this Court admonished in a footnote: "It is not to be assumed that all claims sounding in contract can form the basis of a suit under the Public Vessels Act. * * * It is not our task, of course, to torture the Suits in Admiralty and Public Vessels Acts into an all-inclusive grant of jurisdiction to the District Courts."

2. The decision of the Court below is directly in conflict with the decisions of the Court of Appeals for the Second Circuit in *The Everett Fowler,* 151 F. 2d 662, certiorari denied, 327 U. S. 804, and *C. F. Harms Co.* v. *Erie R. Co., et al.,* 167 F. 2d 562, in which the Tucker Act was held to confer jurisdiction of suits to enforce contractual obligations of the United States, as owner of cargo, where, as here,

[2] In the instant case it was held that the Suits in Admiralty Act applied even though a vessel of the United States was not involved. In *Sinclair Refining Company* v. *United States,* 124 F. Supp. 628 (Ct. Cl. 1954) and *Waterman Steamship Corporation* v. *United States,* 124 F. Supp. 634 (Ct. Cl. 1954) the Court of Claims concluded that the Public Vessels Act was co-extensive with Suits in Admiralty Act with respect to the types of actions authorized.

they did not arise out of the ownership or operation of Government vessels. It is also in conflict with *Ryan Stevedoring Company* v. *United States,* 175 F. 2d 490 (2d Cir. 1949), certiorari denied, 338 U. S. 899, which approved *American President Lines* v. *United States,*[3] 75 F. Supp. 110 (S. D. N. Y. 1947) with which the Court below expressly disagreed and in which it was held that:

> "Many cases have been cited in the briefs of counsel but in those cases which held that a suit would not lie under the Tucker Act against the United States, in a maritime cause of action, the action arose out of the possession or operation of merchant vessels by the United States. Although the Suits in Admiralty Act refers to 'cargo owned or possessed by the United States', the court is persuaded that it was intended to refer to actions concerning cargo which arose out of the operation of merchant vessels by the United States and not to the type of action herein."

3. The importance of the question presented is clear from the fact that the United States is not only a large owner and charterer of vessels but also is one of the largest single overseas shippers and is continually contracting with numerous members of the shipping industry. Hence the current confusion as to the proper Act under which to sue the United States in given situations will continue to multiply and vex litigants until this Court clarifies the spheres of application of each Act in maritime matters.

Presently, a suit against the United States in a maritime matter will be met by a motion to dismiss no matter which

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[3] This case involved a suit against the United States on a bill of lading for freight due on Government cargo. The vessel was privately owned and operated. No valid distinction can be made between a suit for bill of lading freight and a suit for general average due by the terms of a bill of lading.

Act is invoked. Apparently there is a division of opinion or no fixed policy on the matter in the Department of Justice. Witness *Prudential Steamship Company* v. *United States,* 122 F. Supp. 164 (S. D. N. Y., 1954) where the Government succeeded in dismissing a libel in admiralty although in the same Court in *States Marine Corp.* v. *United States,* 120 F. Supp. 585 (S. D. N. Y., 1954), as in the instant case, it contended that the Suits in Admiralty Act provided the sole remedy.[4]

The suit time limitation differs under each Act. If maritime contracts with the United States can be sued on only under the Suits in Admiralty Act, they have a second class status. Suit under that Act must be brought within two years, whereas the Tucker Act permits suit on other contracts within six years. In general average cases time for suit must be counted from the termination of the venture. *United States* v. *Atlantic Mutual Insurance Company,* 298 U. S. 483. Two years is not a realistic period for suit in general average. Yet, if a litigant is to be safe, it is necessary to sue in admiralty within two years as a precaution. Often such suits are premature because the Government Agency involved has not had time to act administratively. Indeed, in complicated general average situations or where a General Average Adjustment is delayed by litigation which intervenes on questions of salvage fees or the like, completion of the General Average Statement may not be possible for three, four or five years.[5] In these situations, if Tucker Act suits are the proper remedy, the numerous

[4] Both cases cited have been appealed to the Court of Appeals, Second Circuit. Oral Argument was had December 15, 1954 and decisions are awaited.

[5] In this instance the General Average Statement was not completed until February 10, 1953, and shortly thereafter a copy was served on the Government. Although more than 20 months have now elapsed, final administrative action has not yet been taken by the Military Sea Transportation Service.

precautionary suits now being brought are unnecessarily crowding District Court calendars and causing the parties and the Government needless work and expense.

On the other hand, a litigant cannot hedge by simultaneously filing suit in the Court of Claims because that Court is without jurisdiction if another suit for the same relief is pending in another court. 28 U. S. C. §1500. Therefore, if administrative settlement becomes impossible, litigants must choose at their peril between suit in one Court or the other.

4. The decision below is believed to be erroneous and the conflicting decisions in the Second Circuit, *ante,* pp. 5 and 6, correct. As pointed out, those cases hold that the Suits in Admiralty Act gives a remedy only in cases arising out of the ownership or operation of a vessel by or for the United States. This Court has dealt with the Act only in such cases[6] and the point here raised has never been before this Court,[7] except implicitly in *Alcoa Steamship Company* v. *United States, supra.*

The language of the Act and its legislative history fully support the proposition that it applies only in such cases. Section 9 of the Shipping Act of 1916, as amended, 46 U. S. C. §808, provided that all vessels in which the United States was interested, as owner or otherwise, were subject

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[6] The principal ones are: *Blamberg Bros.* v. *United States,* 260 U. S. 452; *Eastern Transportation Co.* v. *United States,* 272 U. S. 675; *Fleet Corporation* v. *Rosenberg,* 276 U. S. 202; *Johnson* v. *Fleet Corporation,* 280 U. S. 320; *Matson Navigation Co.* v. *United States,* 284 U. S. 352, and *Calmar Steamship Corporation* v. *United States,* 345 U. S. 446.

[7] The Court of Appeals, Second Circuit, has noted with respect to the Suits in Admiralty Act: "It is perhaps strange that, although the remainder of the statute has been extensively litigated, there seems almost no litigation, and certainly no decision, dealing with the meaning of cargo in this connection. But we apprehend that it will be found as difficult as the remaining portions have already proved to be. * * *." *Ryan Stevedoring Co.* v. *United States,* 175 F. 2d 490, 492.

to the same liabilities as those of private parties. In *The Lake Monroe,* 250 U. S. 246, it was held that such vessels were subject to seizure under a libel in admiralty. The Suits in Admiralty Act was passed to relieve the inconvenience to Government vessels thus caused by the Shipping Act and an *in personam* libel was substituted for the right to proceed *in rem.*[8] Section 2 of the Suits in Admiralty Act decreed that such libel would lie where a proceeding in admiralty could be maintained between private parties "provided such vessel is employed as a merchant vessel * * *". The words "such vessel" necessarily refer to the vessels mentioned in Section 1 which are vessels owned, possessed or operated by or for the United States. This proviso shows that the proponents of the Act and Congress contemplated only *in personam* libels which arose out of the ownership or operation of such vessels. It is entirely inappropriate and indeed incomprehensible when considered in relation to a libel concerning cargo wholly unconnected with a Government owned or operated vessel.

Of late, Government counsel direct attention to *The Davis,* 10 Wall 15 (1869), and *United States* v. *Wilder,* 28 Fed. Cas. No. 16,694 (C. C., D. Mass. 1838) which held that Government cargo may be attached in the hands of a third party. They argue that the reference to "cargo" in the Act was intended to nullify these cases. However, these cases posed no problem during the half century which transpired before the Suits in Admiralty Act was passed and Government counsel fail to cite any evidence that they were given the slightest thought when the Act was under consideration by Congress.

Although the Court of Claims has accepted this unsupported argument, it is submitted that it is nothing more

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[8] S. Rept. No. 223, 66th Cong., 1st Sess.; House Committee on the Judiciary, 66th Congress, 1st Session, November 13, 1919; Cong. Rec., Vol. 59, Part 2, p. 1678; Conference Rept., No. 669, 66th Cong., 2nd Sess.

than an attempted rationalization from hindsight. The fact that, after an accident or disaster to a Government vessel, cargo carried thereon may be salvaged along with the vessel and that either or both may be subject to attachment in the hands of salvors for salvage fees is adequate explanation for the reference to "cargo" in the Act. Indeed, the Act in the form in which it was passed by Congress shows that salvage suits were considered for it was entitled: "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels * * *." Appendix B.

However desirable it may be that all maritime suits against the Government lie in admiralty (and this must be doubted in view of the brevity of suit time and for other reasons), the Act should not be interpreted to encompass situations not clearly within its terms nor its original intendment. Particularly to be avoided is any interpretation, not clearly required, which creates conflicts with other statutes (Tucker Act) or impairs the well settled jurisdiction of other Courts.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, December 28th, 1954.

Respectfully submitted,

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APPENDIX A.

PERTINENT STATUTORY PROVISIONS.

TUCKER ACT.

28 U. S. C. §1491. CLAIMS AGAINST UNITED STATES GENERALLY.

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort.

* * * * * *

28 U. S. C. §1500. PENDENCY OF CLAIMS IN OTHER COURTS.

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

* * * * * *

28 U. S. C. §2401. TIME FOR COMMENCING ACTION AGAINST UNITED STATES.

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at

the time the claim accrues may be commenced within three years after the disability ceases.

* * * * * * *

SUITS IN ADMIRALTY ACT.

(Act of March 9, 1920, 41 Stat. 525, Secs. 1 and 2 [46 USC, §§741 and 742])

An Act Authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel *in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. * * *.

Public Vessels Act.

(46 U. S. C. §781 *et seq.*)

46 U. S. C. §781. Libel in Admiralty Against or Impleader of United States.

A libel *in personam* in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.

APPENDIX B.

OPINION BELOW.

(This joint opinion was rendered in this case and in the case of *Lykes Bros. Steamship Company* v. *United States,* 124 F. Supp. 622.)

LITTLETON, *Judge,* delivered the opinion of the court:

These cases come before the court on defendant's motions to dismiss plaintiffs' petitions. The question presented is whether a suit for general average contribution by Government cargo is maintainable under the Tucker Act, 28 U. S. C. 1491, upon which plaintiffs have based their actions, or whether their alleged causes of action are cognizable under the Suits in Admiralty Act, 46 U. S. C. 741 *et seq.,* which vests jurisdiction in the federal district courts. Sections 1 and 2 of that Act read in part as follows:

> [Sec. 1] No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions: * * * [41 Stat. 525, 46 U. S. C. 741.]
>
> [Sec. 2] In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel * * *. Such suits shall be brought in the district court of the United States for

> the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * * [41 Stat. 525, 46 U. S. C. 742.]

The vessels in question, owned by plaintiffs,[1] were operated by them for their own use in commercial shipping and carried, among other things, Government-owned cargoes under bills of lading and space charters. While transporting said cargo the ships became stranded, with both vessels and cargoes being saved at plaintiffs' expense. Plaintiffs have brought these actions to recover from defendant as part owner of the cargoes a general average contribution toward the rescue expenditures. Defendant has moved to dismiss on the grounds that plaintiffs' remedy, if any, is a suit in the district court under the Suits in Admiralty Act.

Plaintiffs' contention is that a suit with respect to Government-owned cargo is not authorized under the above Act unless such cargo is carried on vessels owned or operated by or for the United States. Plaintiffs point out that here while Government cargo is involved the ships were privately owned and were not operated by or for the United States. In short, plaintiffs argue that Congress in referring to cargo in the Act had reference to only Government cargo on vessels which fell within the terms of the Act.

Defendant asserts that the plain language of the Act shows no such intention. Defendant contends that the Act provided, *inter alia,* for three distinct objectives which are pertinent here: (1) It gave immunity from seizure to Government-owned vessels or vessels operated by or for it employed in the merchant service, (2) excepted from seizure Government cargo and (3) substituted for the in rem proceeding which could be had in admiralty courts if private parties were involved a proceeding in personam

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[1] In No. 488—53, Lykes Bros. Steamship Co., Inc. operated the SS. *Benjamin Huntington* as bareboat charterer and as owner *pro hac vice.*

In No. 31—54, Waterman Steamship Corporation operated the SS. *Fairisle* as owner.

against the United States whenever (1) or (2) was found to exist.

The enactment of the Suits in Admiralty Act shortly after the close of the First World War stemmed from a desire on the part of Congress to prevent interference with the Government's traffic in the commercial shipping trade which traffic had become quite extensive during the war period. Under the Shipping Act of 1916, 39 Stat. 728, the Supreme Court held that Government vessels or those operated for it were subject to arrest and seizure in admiralty proceedings. *The Lake Monroe,* 250 U. S. 246. For many years Government-owned cargo on private vessels had been subject to in rem actions in the admiralty courts. *The Davis,* 10 Wall. 15.

Therefore, Congress in a move to free Government shipping from these restrictions passed the Suits in Admiralty Act which removed the restrictions and at the same time via a suit in personam provided a remedy for those seeking redress against the Government arising from the operation of Government ships or the transportation of Government cargo. The remedy under that Act is exclusive. *Johnson* v. *U. S. Shipping Bd. Emergency Fleet Corp.,* 280 U. S. 320.

The language of the Act supports defendant's position. Section 741 speaks of "No vessel owned by the United States * * * or in possession of the United States * * * or operated by or for the United States * * *, *and no cargo owned or possessed by the United States* * * *, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure * * *." [Italics supplied.] Section 742 provides for the libel in personam vesting jurisdiction in the district court. Nothing in the language suggests the construction urged by plaintiffs. Both the language in the Act as well as that of the original bill as passed by the Senate and the amendment to Section 1 (Sec. 741) offered in the House treat the terms "vessel" and "cargo" in the disjunctive.[2] This language, when read

[2] Senate Bill 3076, 66th Cong., 1st Sess. and House Amendments, 66th Cong., 2d Sess. appear in 59 Cong. Rec. 1678.

in light of the purposes behind the Act, the fact that general average contribution is a maritime cause of action and that the district courts are the accustomed forum for admiralty matters, supports the view we take here. *Calmar S. S. Corp.* v. *United States,* 345 U. S. 446; *M & J Tracy, Inc.* v. *United States,* 125 C. Cls. 70, cert. den. 346 U. S. 854; *Field* v. *United States,* 125 C. Cls. 559, cert. den. 346 U. S. 922.

In so holding we respectfully disagree with results reached by the District Court of the Second Circuit in *American President Lines, Ltd* v. *United States,* 75 F. Supp. 110; *States Marine Corp. of Del.* v. *United States,* 120 F. Supp. 585; and *Prudential Steamship Corp.* v. *United States,* 122 F. Supp. 164. Our holding, however, is in accord with that of the District Court of California in *Pacific Far East Lines Inc.* v. *United States,* 1952, A. M. C. 815 (N. D. Cal.). The decision in *Ryan Stevedoring Co.* v. *United States,* 175 F. 2d 490, cert. den. 338 U. S. 899, relied upon by the plaintiffs here and by the court in the *States Marine* and *Prudential* cases, we find to be inapplicable.[3]

Defendant's motions to dismiss are granted and plaintiffs' petitions are dismissed. It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and JONES, *Chief Judge,* concur.

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[3] The facts of that case are briefly these: A truck being operated on a Hoboken pier by the Ryan Stevedoring Co. collided with metal drums containing highly explosive and inflammable material belonging to the Government and about to be loaded on a Government vessel. A fire resulted causing damage to a nearby vessel. The owner of that vessel filed a libel against the Ryan Co., and the latter sought to implead the United States alleging that the Government was negligent in the care of its drums which negligence caused the fire. Jurisdiction in the district court was sought under the Suits in Admiralty Act. The court held the Act inapplicable stating that the liability referred to in the Act arising from Government ownership of cargo must be one "directly connected with the Government's ownership and operation of a vessel." That decision was affirmed on appeal, 175 F. 2d 490, wherein the circuit court also stated: "And the drums on the pier, even if about to be loaded upon a vessel, cannot be considered cargo in any real sense having to do with navigation of government vessels. Here there seems no reason why the standard test of admiralty—location—should not be given its natural effect."

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 501

WATERMAN STEAMSHIP CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. 14–17) is reported at 124 F. Supp. 622.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1954. The petition for a writ of certiorari was filed on December 31, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether pursuant to Sections 1 and 2 of the Suits in Admiralty Act the District Courts have

exclusive jurisdiction over general average claims concerning cargo owned by the United States and carried on privately owned and operated vessels.

STATUTES INVOLVED

The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, provides in pertinent part:

Section 1 (41 Stat. 525, 46 U. S. C. 741):

> * * * That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

Section 2 (41 Stat. 525, 46 U. S. C. 742):

> That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the

> United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *

STATEMENT

According to the allegations of the complaint, the United States Army, in January, 1948, shipped certain merchandise to ports in Germany and France on the S. S. *Fairisle* owned and operated by petitioner. The S. S. *Fairisle* ran aground in the Elbe River. In order to save the ship and the cargo petitioner incurred expenditure, such as salvage fees, tugs, temporary repairs, totalling $133,816.71. Ship and cargo were saved and the voyage successfully completed as the result of these efforts. A general average statement determined that the proportional share of the United States in these disbursements, arising from its ownership of cargo, amounted to approximately $32,000.

After failure on the part of the United States to pay this amount, petitioner filed its complaint in the Court of Claims alleging jurisdiction under the Tucker Act, 28 U. S. C. 1491. The Court

of Claims dismissed the complaint for lack of jurisdiction on the ground that pursuant to Sections 1 and 2 of the Suits in Admiralty Act a general average claim concerning cargo owned by the United States may be enforced in the District Court by a libel in personam and that this remedy is exclusive (Pet. 14–17).

ARGUMENT

The question presented by this petition is whether a suit to enforce a general average claim with respect to government-owned cargo comes within the scope of the exclusive and uniform admiralty jurisdiction of the Suits in Admiralty Act. The decision below which answered this question in the affirmative is in accord with the statutory language and the purpose which the Act sought to accomplish. It is not in conflict with any appellate holding.

1. The jurisdiction conferred upon the district courts under the Suits in Admiralty Act is exclusive. *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 327; *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 356. Accordingly the Court of Claims properly dismissed the complaint for lack of jurisdiction if the instant complaint came within the scope of Sections 1 and 2 of that Act.

Section 1 of the Suits in Admiralty Act prohibits, in view of the provision for a libel in

personam made in Section 2 of the Act, the arrest, or seizure by judicial process, of—

1. a vessel *owned by* the United States,
2. a vessel *in the possession of* the United States,
3. a vessel *operated by or for* the United States, and
4. *cargo owned or possessed by the United States.*

Section 2 of the Act provides that a libel in personam may be brought against the United States "in cases where if such vessel were privately owned or operated, or *if such cargo were privately owned and possessed,* a proceeding in admiralty could be maintained," in other words where a cause of action is "characteristically within the admiralty jurisdiction". *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 358.

The subject matter of this action is a claim for general average, "an ancient feature of the maritime law", which if brought against a private party could be maintained by proceedings in rem or in personam in admiralty. *United States* v. *Atlantic Mutual Insurance Co.,* 298 U. S. 483, 488, 489. Petitioner thus seeks to enforce a claim with respect to cargo owned by the United States which, if the property were privately owned, would be enforceable in admiralty. It

follows that under the express language of the Act the District Courts have exclusive jurisdiction and that the Court of Claims properly dismissed the complaint.[1]

Seeking to avoid this result, petitioner argues that the statute does not mean what it says and that it refers only to cargo carried on vessels owned or operated by or for the United States. This reading of the statute does violence to the statutory language which does not subordinate the cargo clause of the statute to the vessel clauses but clearly treats all of them as coordinate and independent elements.[2] We know of no consideration which would justify departing from the clear wording of the Act. On the contrary, the legislative background of the Suits in Admiralty Act indicates that it was the very purpose of the

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[1] *United States* v. *Atlantic Mutual Insurance Co.*, 298 U. S. 483, does not hold to the contrary. The court in that case dismissed a general average claim filed under the Tucker Act for failure to comply with the six year statute of limitations after having determined that the Suits in Admiralty Act was not applicable by reason of the fact that the vessel was in public service (298 U. S. at 488–489). Since the claim accrued on January 19, 1919 (*ibid* at 490), it could not have been adjudicated under the Public Vessels Act which is limited to claims arising after April 6, 1920 (Public Vessels Act, Section 1, 43 Stat. 1112, 46 U. S. C. 781). Thus it has no bearing on the situation presented here where the claim comes within the terms of the Suits in Admiralty Act.

[2] Section 1 "* * * and no cargo owned or possessed by the United States." Section 2 "* * * In cases where *if such vessel* were privately owned or operated, or *if such cargo* were privately owned and possessed * * *."

Act to exempt government cargo as well as government vessels from seizure and to substitute an exclusive remedy in personam in the admiralty courts.

The immediate impetus for the enactment of the Suits in Admiralty Act was the decision of this Court in *The Lake Monroe,* 250 U. S. 246, holding that under the waiver of immunity contained in Section 9 of the Shipping Act of 1916 (39 Stat. 730) government merchant vessels had become subject to seizure in admiralty proceedings. It was felt that the drastic in rem proceedings of the maritime law were extremely embarrassing as far as the government was concerned and that actions in personam should be substituted for them. *Blamberg Bros.* v. *United States,* 260 U. S. 452, 458–459; *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, 218–219.

Actions under Section 9 of the Shipping Act of 1916, however, were not the only instance in which government property was subject to seizure in admiralty. Libels in rem to enforce maritime claims such as salvage and general average also could be brought against government property not in the possession of a government agent. *The Davis,* 10 Wall. 15; *United States* v. *Wilder,* 3 Sumn. 308, 28 Fed. Cas. No. 16694. The potentialities of the seizure of government property in times of national stress were highlighted in 1916 when a libel in rem of munitions belonging to

the Russian Government, then at war, was upheld on the authority of *The Davis, supra. The Johnson Lighterage Co. No. 24,* 231 Fed. 365 (D. N. J.).

The very wording of the Suits in Admiralty Act indicates that its draftsmen intended to substitute the libel in personam not only for ship seizures but for all instances of essentially admiralty proceedings known to them[3] in which admiralty libels in rem were likely to interfere with governmental operations.[4] Moreover, the enactments of the Suits in Admiralty and Public Vessels Acts point to a Congressional desire to provide for a uniform procedure in the district courts, "the accustomed forum in matters of admiralty", in all maritime cases in which the United States is subject to suit. *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 327;

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[3] *The Davis*, 10 Wall. 15, was discussed in Benedict, *Admiralty*, 4th Ed. 1910, Section 227, and in two law review articles published in 1919. Wright, *Government Ownership and the Maritime Lien*, 7 California Law Review, 242, 247–248, and Lord, *Admiralty Claims against the Government*, 19 Columbia Law Review 467, 477.

[4] The bill which became the Suits in Admiralty Act was originally drafted in the Shipping Board and carefully examined and revised by the Department of Justice. Hearing before the House Committee on the Judiciary, 66th Cong., 1st Sess., on the Attorney General's substitute for S. 3076 and H. R. 7124, pp. 9–22, 45–48. H. Rept. 497, 66 Cong. 2d Sess., p. 4.

Calmar S. S. Corp. v. *United States,* 345 U. S. 446, 455–456.

The wording of the Act is fully consistent with this underlying legislative policy; it is the petitioner who seeks to "torture" the plain statutory language, and to establish a class of cases which, although "characteristically within the admiralty jurisdiction", are not to be heard in the customary admiralty courts when the United States is the defendant,[5] and to expose government cargos to interference by libels in rem. The decision of the Court of Claims is thus clearly correct.

2. Petitioner's main argument, however, seems to be not so much that the decision below is erroneous, but rather that it is in conflict with several decisions of the district courts for the Eastern and Southern Districts of New York and with dicta of the Court of Appeals for the Second Circuit. Petitioner further anticipated that a conflict might arise from the decisions of the

[5] Petitioner's argument that the two year statute of limitations of the Suits in Admiralty Act is too short for general average claims because the completion of the general average statement may take four to five years disregards the admiralty practice of trying separately the issues of liability and damages. The factual question of whether the ship is entitled to general average ought to be tried with reasonable speed while the witnesses are still available, and the computation of the exact amount due may go on pending the judicial determination of liability.

latter court in two cases involving the same issues argued on December 15, 1954, and under advisement at the time when the petition for certiorari was filed.

The decision of the Court of Appeals for the Second Circuit in the two cases just referred to was handed down on February 24, 1955. This decision, which is reproduced in an appendix to this brief, *infra,* pp. 12–23, specifically adopts the view followed by the court below in this case, thus eliminating the anticipated conflict. Moreover, the decision repudiates the contrary decisions in the district courts as well as the dicta of the prior Second Circuit cases relied on by petitioner. Thus, all elements of conflict between the Court of Claims and the Second Circuit have disappeared.

While there may be some area left in which there may be difficulty in the demarcation of remedies under the Tucker Act and the Suits in Admiralty Act, those issues should be tested if they actually arise. Petitioner's claim is plainly covered by the Suits in Admiralty Act and does not constitute the proper vehicle to test those speculative situations.

CONCLUSION

The decision of the Court of Claims is correct and in accord with a recent holding of the Court of Appeals for the Second Circuit. There is no conflict and no need for the further review. It

is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1955.

APPENDIX

United States Court of Appeals for the Second Circuit

Nos. 86, 145

October Term, 1954

Argued December 15, 1954

Decided February 24, 1955

Docket Nos. 23151, 23222

PRUDENTIAL STEAMSHIP CORPORATION, LIBELLANT-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

STATES MARINE CORPORATION OF DELAWARE, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Before SWAN, FRANK and HINCKS, *Circuit Judges*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

These appeals were argued together. In each case the owner of a privately owned and operated

merchant vessel sought to recover a general average contribution from the United States as owner of part of the vessel's cargo. In the Prudential case, Judge Goddard sustained an exception to the libel brought under the Suits in Admiralty Act and dismissed the libel for lack of jurisdiction, 122 F. Supp. 164. The libellant appealed. In the States Marine case the action was brought under the Tucker Act and, jurisdiction having been sustained pursuant to the opinion of Judge Irving R. Kaufman, 120 F. Supp. 585, judgment was awarded to the plaintiff. The United States appealed.

Thacher, Proffitt, Prizer, Crawley & Wood, Proctors for Libellant-Appellant; John C. Crawley and John J. Leibell, Advocates.

Warren E. Burger, Assistant Attorney General, J. Edward Lumbard, United States Attorney, Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, and Hubert H. Margolies and Benjamin H. Berman, Attorneys, Department of Justice, for the United States.

Kirlin Campbell & Keating, Attorneys for Plaintiff-Appellee; John F. Gerity and Walter P. Hickey, of Counsel.

SWAN, *Circuit Judge:*

These appeals, which were argued together, present closely related questions as to the jurisdiction of the District Court in suits to recover general average contribution from the United States as owner of part of the cargo carried on a privately owned and operated merchant vessel.

In the Prudential case the vessel owner brought a libel under the Suits in Admiralty Act, 46

U. S. C. A. § 741 et seq. An exception challenging the jurisdiction of the court was sustained and the libel was dismissed pursuant to an opinion by Judge Goddard reported in 122 F. Supp. 164. Although expressing doubt about the matter, Judge Goddard felt that in the interest of judicial consistency he should follow the interpretation of the Suits in Admiralty Act taken in Judge Irving R. Kaufman's opinion in the States Marine case, 120 F. Supp. 585. That was an action brought under the Tucker Act, 28 U. S. C. A. § 1346 (a) (2), on the civil side of the District Court, to recover a general average contribution from the United States as owner of part of the cargo carried on the plaintiff's vessel. Jurisdiction was challenged by the United States on the ground that the claims alleged in the complaint are cognizable exclusively under the Suits in Admiralty Act. In sustaining jurisdiction, Judge Kaufman, relying on prior district court decisions and a statement in *Ryan Stevedoring Co.* v. *United States,* 2 Cir., 175 F. 2d 490, 493, certiorari denied 338 U. S. 899, ruled that the Suits in Admiralty Act does not apply to government owned cargo carried on a private vessel but concerns only cargo carried on merchant vessels operated by or for the United States.

Judge Goddard's doubt as to this interpretation of the Suits in Admiralty Act was well founded. We can see nothing in the language of the Act, or in the purpose of its enactment, to justify restricting the statutory phrase, "cargo owned or possessed by the United States," to cargo carried on a vessel operated by or for the United

States. Under the Shipping Act of 1916, 46 U. S. C. A. § 801 et seq., merchant vessels of the United States were subject to seizure in admiralty proceedings.[1] Likewise, government owned cargo on a private vessel had been held to be subject to a libel in rem for salvage or general average claims.[2] The purpose of the Act was to free government shipping, both ships and cargo, from the inconvenience of arrest and seizure, and in lieu thereof to provide a remedy by a libel in personam for persons entitled to redress from the United States by reason of the operation of government ships or the transportation of government cargo.

Section 1 of the Act, 46 U. S. C. A. § 741, provides that [1] "No vessel owned by the United States * * * or [2] in the possession of the United States * * * or [3] operated by or for the United States * * * and [4] no cargo owned or possessed by the United States * * * shall, in view of the provisions herein made for a libel in personam, be subject to arrest or seizure by judicial process * * *." Section 2, 46 U. S. C. A. § 742, provides that "In cases where [1] if such vessel were privately owned or operated, or [2] if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained * * *, a libel in personam may be brought against the United States * * *, provided that such vessel

[1] *The Lake Monroe*, 250 U. S. 246.

[2] *The Davis*, 10 Wall. 15; *United States* v. *Wilder*, 28 Fed. Cas. 16, 694; *The Johnson Lighterage Co. No. 24* (C. C. N. Y.), 231 F. 365; see also *Mexico* v. *Hoffman*, 324 U. S. 30, 37.

is employed as a merchant vessel * * *." It will be observed that the references to "vessel" or "cargo" are in the disjunctive; each is given immunity from seizure, and the United States consents to be sued in personam in the district, among others, in which "the vessel or cargo charged with liability is found." There is nothing in the history or the words of the Suits in Admiralty Act to suggest that the claim against government cargo is limited to cargo carried on vessels operated by or for the United States. Indeed, so to limit it, would make superfluous the prohibition in section 741 against seizure of cargo owned or possessed by the United States, for government owned cargo was subject to seizure only when carried on a private vessel. If carried on a government vessel, it was "possessed" by the United States and immune from seizure. See *The Davis,* 10 Wall. 15, at pp. 20–22. To leave subject to arrest government owned cargo, such as munitions of war, when carried on a private vessel, cannot reasonably be thought to have been the legislative intent. The proviso in section 742 that "such vessel is employed as a merchant vessel" apparently refers to government owned or operated vessels; if read broadly enough to include a privately operated vessel it is also satisfied since every privately operated vessel carrying cargo for hire is a merchant vessel. The additional requirement imposed by the district court restricting government cargo to that carried on government vessels or those operated for the government is not justified, in our opinion. "As the words of the section are plain, we are not at

liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history." *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 356.

This gloss upon the statute was introduced by Judge Hulbert in *American President Lines* v. *United States,* D. C. N. Y., 75 F. Supp. 110. It was accepted by the district court in *Alcoa Steamship Co.* v. *United States,* 80 F. Supp. 158; but that case was reversed on other grounds, 2 Cir., 175 F. 2d 661, affirmed 338 U. S. 421. In *Ryan Stevedoring Co.* v. *United States,* 2 Cir., 175 F. 2d 490, 493, certiorari denied 338 U. S. 899, this court cited the *American President Lines* as authority for the statement that "the liability referred to in the statute as arising from the government's ownership of cargo must be one 'directly connected with the Government's ownership and operation of a vessel' * * *." The statement was unnecessary to the decision in the *Ryan* case, since there the government goods had not been loaded on a vessel but were still on the pier, and the actual decision was that goods were not "cargo" until placed aboard the vessel. The vessel on which the goods were to be loaded was a government vessel; hence the Suits in Admiralty Act would have been applicable, under Judge Hulbert's gloss, except for the decision that the goods were not yet cargo.

In a case decided by the Court of Claims, subsequent to the decisions pending before us on appeal, that court disagreed with the results reached by the district court in the cases above cited, and found our *Ryan* case inapplicable.

Lykes Bros. S. S. Co. v. *United States,* 124 F. Supp. 622. In accord is *Pacific Far East Lines, Inc.* v. *United States* (D. C. Cal.), 1952 A. M. C. 815. We agree with the Court of Claims' view that the Suits in Admiralty Act gives the district courts jurisdiction of libels to enforce general average contribution against government cargo carried on a private merchant vessel. Consequently the Prudential Steamship case will be reversed and remanded.

The States Marine appeal poses the question whether a suit against the United States for a general average contribution from government owned cargo can be brought only in admiralty under the Suits in Admiralty Act, as the United States contends, or whether, as the shipowner contends, an alternative remedy on the civil side of the district court is available under the Tucker Act, 28 U. S. C. A. § 1346 (a) (2), by which the district courts are given "original jurisdiction, concurrent with the Court of Claims" of any claim not exceeding $10,000 "upon any express or implied contract".

The pleadings establish that the plaintiff's vessel left the port of New York in December 1947 with a general cargo, part of which was government owned. She reached the port of Piraeus without accident, and there discharged cargo destined for that port. Between Piraeus and Salonika the vessel stranded without fault on her part. To get her off the strand general average expenditures were made. She reached Salonika on January 28, 1948 and all the government owned cargo destined for that port was there delivered and accepted in regular course, part

of the cargo having been delivered from the vessel and part from lighters to which it had been transferred at the time of her strand. A general average statement was served on the United States in October 1951, and by subsequent stipulation the government's share was fixed at $1,623. The plaintiff's action was commenced January 22, 1954. This was timely under the Tucker Act, which provides a six year statute of limitations, 28 U. S. C. A. § 2401 (a). It was barred by the two year limitation of the Suits in Admiralty Act, 46 U. S. C. § 745, if that statute provides the exclusive remedy. Judge Kaufman having ruled that the Suits in Admiralty Act applies only to government owned cargo carried on a vessel operated by or for the United States (120 F. Supp. 585), summary judgment on the pleadings was awarded the plaintiff.

It is the plaintiff's theory that by the express terms of the contracts for carriage of its goods the United States obligated itself to make a general average contribution and that such obligation became unconditionally due upon delivery by plaintiff without exercising its lien, and acceptance by defendant in regular course at Salonika. As an alternative cause of action the complaint relies upon a contract implied in fact to pay general average upon delivery of the goods.

In *Cutler* v. *Rae,* 7 How. 729 the court discussed the nature of the cargo owner's obligation to pay general average when the saved goods are delivered to him. At page 732 it is said:

> The owner is liable, because, at the time he receives the goods, they are bound to share in the loss of other property by which

> they have been saved; and he is not entitled to demand them until the contribution has been paid. And as this lien upon his goods is discharged by the delivery, the law implies a promise that he will pay it. But it is not implied by the maritime law which gave the lien. It is implied upon the principles of the common law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the promise when he received the goods. Indeed, this case seems, in its principles, to be nothing more than the common law action for money had and received, brought in a court of admiralty.

The *Cutler* case was a libel in admiralty by the owner of a vessel against the consignee of cargo to whom the master of the vessel had delivered the goods before the libel was filed. The libel was dismissed because the lien was waived by delivery to the consignee. The principles enunciated were approved in *Dupont de Nemours & Co.* v. *Vance,* 19 How. 162, 171, and were reaffirmed in *Bags of Linseed,* 66 U. S. 108, 113, where the court said that the shipowner's lien "is analogous to the lien given by the common law to the carrier on land * * *." See also *Det Forenede Dampskibs Selskab* v. *Insurance Co.,* 2 Cir., 31 F. 2d 658, 659, certiorari denied 280 U. S. 571. And in *United States* v. *Atlantic Mutual Ins. Co.,* 298 U. S. 483, at 489 the court listed among "well recognized" means of enforcing general average contribution, "a suit *in rem* in admiralty against ship or cargo, a suit *in personam* in admiralty against ship owner or cargo owner, and an action

at law or a suit in equity against ship owner or cargo owner."[3]

Existence of a contract remedy under the Tucker Act has been recognized in several cases arising subsequent to enactment of the Suits in Admiralty Act.[4] However, the appellee concedes that these are not controlling precedents, since the opinions do not discuss whether the Tucker Act remedy was repealed by the Suits in Admiralty Act.

In *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, which was a libel by a shipper of cargo on a government owned vessel operated by the Fleet Corporation, at page 214 the court said:

> Whether in addition to furnishing an exclusive remedy in admiralty, the Act also prevents a resort to any concurrent remedies against the United States or the corporation on like causes of action in the Court of Claims or in courts of law, is a question not presented by these cases and upon which, although referred to in the argument, we express no opinion.

But in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, 327, the court concluded "that the remedies

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[3] This was a suit in the Court of Claims for a general average contribution in respect to cargo carried on a public vessel. The claim arose prior to enactment of the Public Vessels Act, 46 U. S. C. A. § 781 et seq. The suit was dismissed because the claim was barred by the six year limitation of the Tucker Act.

[4] *The Everett Fowler*, 2 Cir., 151 F. 2d 662; s. c. 152 F. 2d 657, certiorari denied 327 U. S. 804; *C. F. Harms Co.* v. *Erie R. Co.*, 2 Cir., 167 F. 2d 562; *Eastern Transportation Co.* v. *United States*, 2 Cir., 159 F. 2d 349; *Alcoa S. S. Co.* v. *United States*, 338 U. S. 421.

given by the act are exclusive in all cases where a libel might be filed under it." The *Johnson* decision reviewed four cases, one of them being *Federal Sugar Refining Co.* v. *United States,* 2 Cir., 30 F. 2d 254. That case involved a cargo of sugar shipped on a vessel owned by and operated for the United States as a merchant vessel. The vessel arrived in New York in March 1920 but made delivery of only part of the sugar. In 1924 the cargo owner brought action in the district court against the United States under the Tucker Act to recover damages for failure to perform the contracts evidenced by the bills of lading. The trial court gave judgment for the defendant. This court affirmed on the ground that the action was too late because the six year limitation of the Tucker Act was repealed by the two year limitation of the Suits in Admiralty Act. The Supreme Court reversed and remanded the cause with directions to dismiss for lack of jurisdiction. The case is not precisely in point since it did not involve government cargo carried on a private vessel, but we believe that the reasoning of the opinion, on page 327, requires us to hold that in such a case the contract remedy formerly available under the Tucker Act is no longer available. This view is in accord with that of the Court of Claims in *Lykes Bros. Steamship Co.* v. *United States,* 124 F. Supp. 627. See also *Calmar S. S. Corp.* v. *United States,* 345 U. S. 446, 455.

It is true that in *United States* v. *Atlantic Mutual Ins. Co.,* 298 U. S. 483, the Supreme Court recognized the jurisdiction of the Court of Claims

under the Tucker Act to enforce a contribution for general average in respect to cargo carried on a *public vessel.* But that holding, we think, was based upon the fact that a public vessel was not one "employed as a merchant vessel" and hence not within the purview of the provisions in the Suits in Admiralty Act, 46 U. S. C. A. § 742, whereby the remedy of a libel in personam against the United States was provided. Both the *Johnson* and the *Atlantic Mutual* decisions were by unanimous opinions with only six years intervening between them. We think it more reasonable to interpret the *Atlantic Mutual* decision as holding that the *Johnson* rule was not applicable to the facts of the *Atlantic* case than as overruling, sub silentio, the *Johnson* rule which had been so recently announced. Moreover, the *Atlantic Mutual* decision dealt with a claim which arose prior to enactment in 1925 of the Public Vessels Act, 46 U. S. C. A. § 781. Consequently, that case does not collide with our holding in *Phalen* v. *United States,* 32 F. 2d 687, that suits under the Public Vessels Act are subject to the statutory limitations of the Suits in Admiralty Act, 46 U. S. C. A. § 745.

In the Prudential appeal the judgment is reversed and the cause remanded for further proceedings. In the States Marine appeal the judgment is reversed and the cause remanded with direction to dismiss.

U. S. GOVERNMENT PRINTING OFFICE: 1958

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 501.

WATERMAN STEAMSHIP CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

PETITIONER'S REPLY.

Petitioner submits this Reply to set forth its position regarding the recent decision of the Court of Appeals, Second Circuit, in the *Prudential Steamship Corporation* v. *United States* and *States Marine Corporation* v. *United States*, decided together, February 24, 1955. The decision is printed in the Appendix to the Brief in Opposition.

Writ of Certiorari is sought here because of the importance of the question whether the Court of Claims has lost jurisdiction in the whole field of maritime contracts and not alone because of conflict between the Court of Appeals, Second Circuit, and the Court of Claims.

Whether the Court of Appeals, Second Circuit, has now overturned its previous decisions[1] and removed all conflict with the Court of Claims may still be open to question. At least, appellee in the *States Marine* case has petitioned

[1] *The Everett Fowler*, 151 F. 2d 662, certiorari denied, 327 U. S. 804, and *C. F. Harms Co.* v. *Erie R. Co., et al.*, 167 F. 2d 562.

the Court to re-consider its decision because of the uncertain manner in which it dealt with its previous decisions. Also, in replying to the Petition for Re-hearing, the United States has requested the Court to clarify its position in that regard.

In any event the Court of Appeals' decision has not detracted from the importance of the question. Neither has it put to rest the perplexing questions involving the scope of the Suits in Admiralty Act nor finally fixed the boundaries between jurisdiction under that Act and jurisdiction under the Tucker Act.

While it was held in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, that the Suits in Admiralty Act granted to the District Courts exclusive jurisdiction in Admiralty of suits involving a Government owned or operated vessel, it has never been held previously by an Appellate Court that the Act applies where the vessel involved was privately owned and operated. On the other hand, *Alcoa Steamship Company* v. *United States*, 338 U. S. 421, stands as authority casting doubt on all decisions holding that Tucker Act jurisdiction has been ousted by the Suits in Admiralty Act where the vessel involved is privately owned and operated.[2] In addition the language of Section 2 of the Suits in Admiralty Act: "provided such vessel is employed, etc." remains unexplained. Literally read this is the *sine qua non* for all libels authorized by the Act. Because of it the Act can apply only to suits involving "such" vessels which, of course, are vessels owned or operated by the United States.

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[2] The *Alcoa* case involved Government cargo but a privately owned and operated vessel. This Court said: "Petitioner instituted this suit under the Tucker Act in the United States District Court for the Southern District of New York to recover freight claimed." The record showed that the question of jurisdiction was sharply contested below. Hence on the principle of *Chicago* v. *Willard*, 220 U. S. 413, 419 and *Mansfield* v. *Swan*, 111 U. S. 379, 382, this Court at least impliedly held that Tucker Act jurisdiction was proper.

Cargo is not something unconnected with a vessel and cannot be so considered. The Suits in Admiralty Act deals with particular vessels, i. e., those owned or operated by or for the United States. Insofar as it deals with cargo it is clear from the Act that it refers to cargo carried on such vessels and not cargo in the abstract. Otherwise, the phrase "provided such vessel is employed, etc." has no meaning in connection with a libel involving Government cargo.

The argument that in referring to "cargo" Congress intended to nullify the *Davis*, 10 Wall 15 (1869), is without support and is not impressive. If that case had been of any concern it is surprising, that Congress did nothing about it during the half century from 1869 to 1920.

In the Brief in Opposition Government counsel say "there may be some area left in which there may be difficulty in the demarcation of remedies under the Tucker Act and the Suits in Admiralty Act". Likewise this Court has stated that the Act is not to be construed as an all-inclusive grant of jurisdiction to the District Courts. *Calmar Steamship Corporation* v. *United States*, 345 U. S. 446 (footnote 8).

Hence it is still far from clear where the boundaries are between Tucker Act and Suits in Admiralty Act jurisdiction and where this Court will ultimately draw them. The problem is of paramount importance because it runs through the whole field of maritime contracts with the United States. Its importance is further emphasized by another aspect of the matter dealt with in No. 502, *Waterman Steamship Corporation* v. *United States*.

Until this Court has spoken, the question presented will continue to vex litigants and the Courts and for the reasons stated above and in the Petition it should be settled by this Court.

Dated: New York, March 15th, 1955.

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